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No. 73-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CRISTOBAL CARDONA, JOSE MARIA DE LA GARZA, PLACIDO RUIZ, AND JULIO RUIZ,
Petitioners

v.

ELLIOT C. RICHARDSON, Attorney General, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the court of appeals (App. B, *infra*, pp. 20-34) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, pp. 35-36) was entered on April 16, 1973. The order of the court of appeals denying respondents' Petition for Clarification and Rehearing (App. D, *infra*, pp. 37-38) was denied on May 22, 1973. On August 22, 1973, Chief Justice Burger extended the time of petitioners for filing a petition for a writ of certiorari to and including September 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Mexican aliens who commute daily to the United States to work and who do not maintain residences in this country when they return each evening to Mexico can enter the United States without immigrant visas on the ground that they are "returning resident immigrants" (8 U.S.C. 1181(b)) "returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)).

2. Whether such Mexican aliens are non-immigrants who cannot enter the United States to work unless no American labor is available because each has a "residence in a foreign country which he has no intention of abandoning" and "is coming temporarily to the United States to perform temporary services or labor" (8 U.S.C. 1101(a)(15)(H)).

STATUTES INVOLVED

8 U.S.C. 1101 provides in pertinent part:

> § 1101. Definitions.
>
> (a) As used in this chapter—
>
> * * * *
>
> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * *
>
> (H) an alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country * * *.
>
> * * * *
>
> (20) The term "lawfully admitted for permanent residence" means the status of having been lawfully

accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * *

(27) The term "special immigrant" means—

* * * *

(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

* * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

8 U.S.C. 1181(b) provides:

§ 1181. Admission of immigrants into the United States.

* * * *

(b) Readmission without required documents; Attorney General's discretion.

Notwithstanding the provisions of section 1182(a)(20) of this title in such cases or in such classes of cases and under such conditions as may be by regulations prescribed, returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible may be readmitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, reentry permit or other documentation.

8 U.S.C. 1182(a)(14) provides:

§ 1182. Excludable aliens.

(a) General classes.

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to re-

ceive visas and shall be excluded from admission into the United States:

* * * *

(14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to nonpreference immigrant aliens described in section 1153 (a)(8) of this title.

8 C.F.R. 211.1 provides:

§ 211.1 Visas.

* * * *

(b) *Aliens returning to an unrelinquished lawful permanent residence—(1) Form I-151, Alien Registration Receipt Card.* In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151, Alien Registration Receipt Card * * *.

STATEMENT

Robert Bustos and Lupe Marquia, two California farm workers, and the United Farm Workers Organizing Committee, an organization of farm workers, filed a class action on December 1, 1969, in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought a declaratory judgment and injunctive relief against the practices of the Immigration and Naturalization Service in allowing Mexican aliens, who live in Mexico, to enter the United States daily or seasonally to perform agricultural labor. The complaint alleged that the Service—

(1) Violates the Immigration and Nationality Act of 1952, 8 U.S.C. 401, *et seq.*, and its own regulations by allowing such aliens (hereinafter described as "daily and seasonal commuters") to enter the United States with a Form I-151, a so-called green card, instead of an immigrant visa. The complaint alleged that the commuters could not use a green card because they are not "returning resident immigrants" (8 U.S.C. 1181(b)), are not an "immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad" (8 U.S.C. 1101(a)(27)(B)), and are not immigrants "returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad" (8 C.F.R. 211.1(b)(1)). If the commuters may not enter pursuant to green cards, they can obtain an immigrant visa only if the Secretary of Labor certifies under 8 U.S.C. 1182(a)(14) that there are not sufficient workers in the United States willing to perform agricultural work and that their entry will not affect wages and working conditions of domestic workers. No such certification could be issued because the Secretary of Labor has determined that the supply of farm labor is sufficient and the admission of farm laborers would ad-

versely affect wages and working conditions of domestic workers. Schedule B, following 29 C.F.R. 60.6;

(2) Violates the Immigration and Nationality Act by considering commuters as immigrants rather than as non-immigrants "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States to perform temporary services or labor" under 8 U.S.C. 1101(a)(15)(H). If commuters are non-immigrants, they cannot enter the United States because Section 1101(a)(15)(H) allows entry only "if unemployed persons capable of performing such service or labor cannot be found in this country" and the Secretary of Labor has never issued such a certification for farm laborers in the western United States because no shortage of unskilled farm labor exists there;

(3) Violates the Service's regulations which prohibit commuters from acting as strikebreakers (8 C.F.R. 211.1(b)(1)) by allowing commuters to take employment at places where the Secretary of Labor has determined that a labor dispute exists merely because the commuter had previously worked for the same employer during a prior agricultural season.

On May 13, 1970, the district court granted the motion of the four petitioners, who are Texas farm workers, to intervene as plaintiffs on behalf of themselves and all farm workers in Texas. On June 8, 1970, the parties agreed to a stipulation of facts. On December 21, 1971, the district court granted without opinion the motion of the government for summary judgment, denied the motions of plaintiffs and plaintiff-intervenors for summary judgment, and dismissed the complaint (App. A, *infra*, p. 19).

On appeal, plaintiffs and plaintiff-intervenors renewed their arguments on all the claims described above. On April 16, 1973, the court of appeals held that, with re-

gard to daily commuters, "the statutory language is not as plain and unambiguous as plaintiffs contend. * * * [T]he concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his house in the suburbs is located in New Jersey or Connecticut" (App. B, *infra*, p. 32). The court said that since the practice began in 1927 and had continued for 45 years, and since Congress had never expressed any desire to change it, "it is fair to assume that the historic daily commuter practice known to Congress was expected to continue unchanged in the 1952 law" (*id.* at 31). The court therefore concluded that daily commuters were residents of the United States within the meaning of the Act and could continue to enter the country as immigrants using a green card.

In contrast, the court of appeals found that seasonal commuters are not "returning resident aliens" and therefore the entry of such aliens without immigrant visas "is in violation of the clear and plain language of the statute" (App. B, *infra*, p. 26). Moreover, since "[a]ll commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor," the court found that they came clearly within 8 U.S.C. 1101(a)(15)(H) which defines such persons as non-immigrants (*id.* at 27). The court concluded that, unlike in the case of daily commuters, the seasonal commuter system was created by the Service after 1964 even though Congress had both deliberately allowed the bracero program, which allowed the import of Mexican agricultural workers, to lapse and had strengthened the

Immigration Act of 1965 to safeguard American labor (*id.* at 23-25).

On April 30, 1973, petitioners filed a Petition for Clarification and Rehearing limited to two points. First, petitioners contended that commuters who come daily to the United States only during the agricultural season, rather than daily throughout the year to a permanent job, are properly considered as seasonal commuters under the court's reasoning and therefore could no longer enter the United States with a green card. Petitioners, however, asked that the position of these commuters be clarified since the court's opinion was not entirely clear. Second, petitioners asked that the court decide the contentions of the parties as to the Service's strikebreaker regulations which had not been decided or even addressed in the opinion.

On May 22, 1973, the court of appeals denied the motion (App. D, *infra*, pp. 37-38). However, the court explicitly did not determine the merits of the arguments advanced by petitioners. Instead, the court stated that "the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue" and that "[i]f a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal."

REASONS FOR GRANTING THE WRIT

1. The government has filed a petition for a writ of certiorari insofar as the court of appeals held that seasonal commuters are properly non-immigrants and, alternatively, even if they are immigrants, they cannot enter the United States pursuant to a green card without immigrant visas. No. 73-300. The farm workers have

filed a Brief in Opposition to that petition. As stated in the Brief in Opposition, we believe that review by this Court of the decision below is not warranted with regard to either daily or seasonal commuters. However, if the government's petition is granted as to seasonal commuters in No. 73-300, we submit that the issue of daily commuters should also be reviewed and that therefore this petition should be granted.

The alleged rights of daily and seasonal commuters to enter the United States pursuant to green cards are dependent on the identical statutory provisions and regulations. Much of the analysis of legislative history, administrative practice, and other materials is also relevant to both kinds of commuters. We therefore believe that, if review is to be granted as to any portion of the commuter practice, the entire issue should be before the Court.

2. The entry of daily commuters is of considerable more importance than of seasonal commuters. According to respondents' brief below, there are less than 8,300 seasonal commuters in comparison to over 45,000 daily commuters. Brief for Appellees, p. 3. These large numbers of daily commuters from Mexico cause unemployment and substantially lower wages for American workers in the towns along the border. Department of Labor, "The 'Commuter Problem' and Low Wages and Unemployment in American Cities on the Mexican Border," in *Report of the Select Commission on Western Hemisphere Immigration*, pp. 116, 123, 127-128 (1968).

3. Petitioners further submit that the decision below is incorrect.

The Act defines an immigrant as an alien who does not come within any of the ten specified categories of non-immigrants. 8 U.S.C. 1101(a)(15). One of the categories of non-immigrants is "an alien having a residence

in a foreign country which he has no intention of abandoning * * * (ii) who is coming temporarily to the United States to perform temporary services or labor * * *." 8 U.S.C. 1101(a)(15(H). This definition applies precisely to persons whose permanent homes are and continue to be in Mexico, who come to the United States only for a portion of each day to provide temporary labor, and have no home in the United States.

Even if daily commuters are deemed immigrants, they are required to enter the United States pursuant to a valid immigrant visa. The general rule is that immigrants may not enter the United States without immigrant visas (8 U.S.C. 1181(a)) which in turn requires certification by the Secretary of Labor that their entry will not cause injury to domestic workers (8 U.S.C. 1182(a)(14)). The Act provides an exception "in such cases or in such classes of cases and under such conditions as may be by regulations prescribed" for "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1182(b). However, it is clear that daily commuters do not come within the exception on three distinct grounds.

First, daily commuters are not "returning resident immigrants." The Act defines "residence" to mean (8 U.S.C. 1101(a)(33)):

> the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

It is obvious that daily commuters, who by definition have their only home in Mexico and have no home in the United States (let alone a permanent one), have their "principal, actual dwelling place in fact" in Mexico and are not residents of the United States.

Second, daily commuters do not come within the definition of 8 U.S.C. 1101(a)(27)(B) because they are not

"lawfully admitted for permanent residence" and are not "returning from a temporary visit abroad." The Act defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). While daily commuters were once lawfully accorded the privilege of residing permanently in the United States, their status has changed because they have not assumed residence in the United States. As Judge Eugene Wright demonstrated in his dissenting opinion in *Gooch* v. *Clark*, 433 F.2d 74 (1970), certiorari denied, 402 U.S. 955, any other interpretation of this definition of "lawfully admitted for permanent residence" "makes nonsense of the congressional policy embodied in no fewer than five sections of the Act [which also use this phrase] * * * and is entirely contrary to the plain meaning of two others." 433 F.2d at 83. In any event, a daily commuter entering the United States is not "returning from a temporary visit abroad"; on the contrary, since the daily commuter leaves his home in Mexico to come temporarily to the United States, his temporary visit abroad is from Mexico to the United States rather than from the United States to Mexico.

Third, 8 U.S.C. 1181(b) allows immigrants to enter the United States without immigrant visas only pursuant to regulations. The only applicable regulation is 8 C.F.R. 211.1(b)(1), which provides: "In lieu of an immigrant visa, an immigrant alien returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding 1 year may present Form I-151." This phrase—"unrelinquished lawful permanent residence in the United States after a temporary absence abroad" was no mere inadvertence since it is repeated seven additional times in 8 C.F.R. 211.1(b) and 211.2. It is obvious that a daily commuter who has

his only home in Mexico and comes to the United States only to work does not have an "unrelinquished" and "permanent" residence in this country.

The court below responded to the clear language of the statute and regulation with two arguments:

First, the court said that a person's place of work could be considered his place of residence (App. B, *infra*, p. 32). However, this is directly inconsistent with the definition of residence in the statute as "the place of general abode," as "his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33).

Moreover, the Service has admitted that its practice of admitting daily commuters with a green card does not fit within any language of the Act. Charles Gordon, the General Counsel of the Immigration Service has testified that the commuter status is "a device of convenience," "never specifically * * * authorized by statute." Gordon, "The Amiable Fiction—Alien Commuters Under Our Immigration Laws," in Hearings on Employment of "Green Card" Aliens During Labor Disputes Before Special Subcommittee on Labor of the House Committee On Education and Labor, 91st Cong., 1st Sess. 181-182 (1969). He described the Service's practice as an "amiable fiction." *Id.* at 181, 186. Similarly, Gordon and Rosenfield in their treatise on immigration law state (*Immigration Law and Procedure*, Sec. 2.86):

> Where this employment [of Mexicans and Canadians] is permanent in character administrative ingenuity has devised a 'commuter' status, which enables the Canadian or Mexican to obtain lawful admission for permanent residence in order that he may be able to pursue his employment here, and his right to enter each day is attested by his alien registration receipt card. *Of course, this device is an amiable fiction, since the commuter is coming tempo-*

> *rarily and usually returns to his home in Canada or Mexico each night.* [emphasis added]

In *Matter of H—— O——*, 5 I. & N. 716, 719, note 13 (1954), the Board of Immigration Appeals referred to "the fiction of a commuter's permanent residence coinciding with his place of employment * * *." Accord, *Matter of L——*, 8 I. & N. 643, 646 (1960); *Matter of J—— P——*, 9 I. & N. 591, 593-594 (1962); *Matter of Burciago-Salcedo*, 11 I. & N. 665, 667 (1966); *Matter of Gerhard*, 12 I. & N. 556, 557 (1967). Thus, the Immigration and Naturalization Service freely admits that the commuter practice is not authorized by any statute but was simply invented and continued to meet a need which the Service believed exists.

Second, the court of appeals said that the admission of daily commuters pursuant to a green card, unlike the admission of seasonal commuters, was based on a long-standing administrative practice which was well known to, and not changed by, Congress (App. B, *infra*, pp. 29-31).

While the court below correctly stated that the daily commuter practice began in 1924, it was of no importance until 1952. Since, prior to 1952, Mexican immigrants could readily obtain immigrant visas, the daily commuter system merely relieved them and the Service of the inconvenience of issuing an immigrant visa for each daily visit to the United States. In 1952, however Congress significantly limited the right of Mexican aliens to enter the United States by denying entry if the Secretary of Labor found that an economic threat would result, 66 Stat. 183. In 1965, Congress strengthened this provision by forbidding immigrants to enter unless the Secretary of Labor affirmatively determined that no threat to domestic labor existed. 8 U.S.C. 1182(a)(14).

Congress tightened the provisions relating to the entry of commuters in both the 1952 and 1965 Immigration

Acts. For example, while the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence" (Sec. 104), Congress defined "place of general abode" and therefore "residence" in the 1952 statute as the "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33).

Prior to 1965, the Act allowed the entry, without an immigrant visa, of "otherwise admissable aliens lawfully admitted for permanent residence who depart from the United States temporarily." 66 Stat. 181. This was changed in 1965 to its present wording of "returning resident immigrants, defined in section 1101(a)(27)(B)." 8 U.S.C. 1181(b).

The Committee Reports accompanying the 1965 amendments do not specifically discuss the reason for the change in the wording of Section 211(b). However, all of the 1965 amendments must be interpreted in the light of their stated purpose to provide (S. Rep. No. 748, 89th Cong., 1st Sess. 10 (1965); H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965)):

> Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market.

The specific purpose of the amendment to Section 211(b) becomes clear from the hearings conducted on "commuter workers" by the House Committee on Immigration and Naturalization prior to the 1965 amendments as part of a comprehensive study of population and immigration issues. *Study of Population and Immigration Problems*, House Committee on the Judiciary, Subcommittee No. 1, Special Series No. 11 (1963). The Committee questioned the legality of the commuter practice and its adverse impact on the American economy. *Id.* at 166. During the course of the hearings, the Immigration Service relied on the pre-1965 version of 8

U.S.C. 1181(b) as the statutory basis for the commuter practice. L. Paul Winings, then General Counsel of the Service, insisted that it did not strain the language of that Section to call the commuter's absences from the United States "temporary departures." *Id.* at 169. He admitted, however, that the commuter practice did not fit within 8 U.S.C. 1101(a)(27)(B) which applies to "a temporary visit abroad." "One thinks of a visit as being, I presume, something away from a more permanent place." *Ibid.*

Walter Besterman, an authority on immigration law, who at the time of the 1963 hearings had been the Committee's legislative assistant for 17 years and who had been extremely influential in Congressional consideration of the 1952 Immigration Act, objected to this interpretation of the Act[1] (*id.* at 168-169):

> Is it your view of the very core of this problem that an immigrant who has not established permanent residence in the United States and is a commuter, in this class, is really complying with the law? Is his situation comparable to the status of the nonquota immigrant of the [8 U.S.C. 1101 (a)(27)(B)] class who is an immigrant lawfully admitted for permanent residence who is returning from a temporary visit abroad?
>
> I am asking this question because you [Mr. Winings] mentioned earlier the situation of an immigrant who came here from overseas, established a residence but left his family behind and is going abroad to visit that family. That person would be, in my opinion, a returning immigrant when he comes back, regardless how often he makes the trip. But what is different is the commuter who has not established residence here and therefore is not returning thereto.

---

[1] Besterman, as the record of the hearings demonstrates, was speaking on behalf of the Subcommittee. *Id.* at 166, 167.

Besterman ended the Committee's examination of the legality of the commuter practice by tersely stating, "I do not want to prolong that. I think the facts are before the subcommittee." *Id.* at 169. The Committee responded to the Immigration Service's statutory defense of the commuter practice by removing the phrase which the Service relied upon to justify the admission of daily commuters without an immigrant visa and replacing it with a reference to another provision which the General Counsel of the Service admitted did not cover daily commuters. H.R. 2580, Sec. 9, in H. Rep. No. 745, 89th Cong., 1st Sess. 6 (1965).

This Court has generally looked with disfavor upon the proposition that reenactment of a statute constitutes legislative adoption of its administrative construction. *E.g., Commissioner* v. *Glenshaw Glass*, 348 U.S. 426, 431 (1955); *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1940). As the Court stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119-120, 121 (1941):

> To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.
>
> * * * *
>
> Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Here, where the language of the statute and regulations are clear, where the Congress did not simply pass the statute but significantly tightened its provisions, where Congress' basic purpose was to protect American labor, and where the only legislative history indicates that Congress disapproved the commuter practice, there is no basis for concluding that Congress intended to approve the admission of daily commuters without immigrant visas.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted if this Court grants a writ of certiorari in No. 73-300.

Respectfully submitted,

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SEPTEMBER 1973

APPENDIX A

[Filed December 21, 1971, James F. Davey, Clerk]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3386-69

ROBERT BUSTOS, ET AL., PLAINTIFFS

v.

JOHN H. MITCHELL, ET AL., DEFENDANTS

Order

This cause having come before the Court on the parties' cross-motion for summary judgment and upon consideration of the record and memoranda of the parties; and the Court being fully informed in the premises; and it appears to the Court that there exists no genuine issues of material facts and defendants are entitled to judgment as a matter of law,

It is by the Court this 21st day of December, 1971

ORDERED AND ADJUDGED:

1. That defendants' motion for summary judgment be and it hereby is granted;

2. That the motions of the original plaintiffs and the intervenor-plaintiffs for summary judgment be, and they hereby are, denied; and

3. The action is hereby dismissed.

AUBREY E. ROBINSON, JR.,
United States District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Decided April 16, 1973 [Judgment entered this date]

Bruce J. Terris, with whom *Joseph Onek* was on the brief for appellants. *John W. Karr* also entered an appearance for appellants.

Ralph Farb, Attorney, Immigration and Naturalization Service, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry*, and *Gil Zimmerman*, Assistant United States Attorneys were on the brief for appellees.

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Court*, LEVENTHAL, *Circuit Judge*, and JOHN H. PRATT,** *United States District Judge for the United States District Court for the District of Columbia.*

Opinion for the Court filed by *District Judge* PRATT.

PRATT, *District Judge*: This case challenges the legality of the system whereby the Immigration and Naturalization Service [1] for many years has permitted and continues to permit Mexican aliens [2] to commute either daily or seasonally from their place of residence in Mexico to employment in the United States. Plaintiffs-appellants Robert Bustos, an American citizen, and Lupe Murquia, a Mexican national permanently residing in the United States, are farm workers in California. The United Farm Workers Organizing Committee is an organization of farm workers whose purpose is to secure higher wages and better working conditions for its members. The defendant-appellees are the Attorney General, the Commissioner of the Service, and the Regional Commissioner of the Service for the Southwest Region. The defendants have the statutory responsibility of enforcing the immigration and naturalization laws of the United States.

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* Sitting by designation pursuant to 28, U.S.C. § 291(a).

** Sitting by designation pursuant to 28, U.S.C. § 292(a).

[1] Hereinafter referred to as the "Service."

[2] Although the gravamen of the Complaint is directed solely toward the Mexican aspect of this problem, there is no gainsaying the fact that the same considerations are applicable to commuters from Canada.

Plaintiffs filed a class action in the United States District Court for the District of Columbia on behalf of all citizens and alien permanent residents of the United States engaged in farm labor in California. The complaint sought declaratory and injunctive relief against the practice of the Service in admitting daily and seasonal commuters into the United States to perform agricultural labor. Five farm workers in Texas were permitted to intervene as plaintiffs for themselves and on behalf of all farm workers in Texas. There is no dispute as to any material facts. Acting on cross-motions, the District Court, on December 21, 1971, granted the motion for summary judgment of the defendants, denied the motions of plaintiffs and intervenor-plaintiffs, and dismissed the action. This appeal followed.

The issues raised by the parties on appeal are three. (1) Can aliens commuting daily or seasonally to work in the United States without maintaining residences in this country enter the United States without immigrant visas and without a certification by the Secretary of Labor that (a) there is a shortage of domestic labor of the kind the aliens are to perform, and (b) their employment will not affect wages and working conditions of American workers? (2) Are most commuters properly classifiable as non-immigrants who therefore may not be admitted into the United States unless the Secretary of Labor determines that no domestic labor is available? (3) Does 8 C.F.R. § 211.1(b)(1) (1972) permit commuters to enter the country to take employment where a labor dispute exists even if they previously have been employed there? Plaintiffs contend that the plain language of the statute and the lack of a consistent administrative practice regarding commuters dictate a decision in their favor. The defendants join the issues by contending that the alien commuter system is the product of a long-standing consistent administrative application

of the immigration laws and that Congress has repeatedly ratified the existence of this practice.

The Court is convinced that the parties have drawn the issues too broadly and consequently have not focused upon a vital distinction in the history of daily and seasonal commuters.[3] The distinction between these two types of commuters coupled with their relevant histories dictate the differing treatment we have given each of these classs of commuters.

I

The administrative treatment by the Service of the seasonal commuter aspect of this overall problem makes appropriate a brief reference to the origin and history of the bracero program. Due to the unusual farm labor shortage in the United States during World War II, the United States and Mexico in 1943 initiated the bracero program to provide for the seasonal importation of Mexican agricultural workers.[4] In 1951, when Congress renewed the bracero program in Public Law 78, it strengthened provisions in the agreement in order to protect domestic labor.[5] Growers were required to make reasonable efforts to attract domestic workers prior to certification by the Department of Labor of the need for foreign labor. During the 1950's and early 1960's, the importation of Mexican agricultural workers under the bracero

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[3] Daily commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who commute daily to work in the United States. Seasonal commuters are persons, whose actual dwelling place in fact, without regard to intent, is in a foreign contiguous country, and who come to the United States for extended periods to perform seasonal work. *See generally* 8 U.S.C. § 1101(a)(33) (1970).

[4] Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers, effected August 4, 1942, 56 Stat. 1759.

[5] Act of July 12, 1951, 65 Stat. 119.

program increased markedly. Despite the added safeguards to protect American labor, there arose a growing concern in the country over the program's adverse impact on domestic labor, Congress in 1964 therefore decided to allow the program to lapse.

Soon after Congress ended the bracero program, it amended in 1965 the Immigration and Nationality Act of 1952, the basic statute, to provide "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market." [6] The most important change was to strengthen the labor certification process. Section 212(a)(14) of the Immigration Act of 1952 had proved ineffective because an alien only could be excluded if the Secretary of Labor previously had certified that admittance of the alien would have an adverse effect on American labor. The Secretary had no way of knowing those who had applied to immigrate to the United States or their prospective occupations, residences, or employers. The 1965 amendments radically changed the certification procedure by reversing the burden of initiating the certification process. Under the new provision, an alien laborer cannot enter the United States unless the Secretary of Labor has certified that there is not enough domestic manpower available to perform such tasks and that his employment would not adversely affect the wages of American workers similarly employed. 8 U.S.C. § 1182(a)(14) (1970).

Despite this background, the Service after the termination of the bracero program in 1964 created a new class of commuter—a "new immigrant," the seasonal worker.[7] The Service has admitted that the

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[6] H. Rep. No. 745, 89th Cong., 1st Sess. 18 (1965); S. Rep. No. 733, 89th Cong., 1st Sess. 10 (1965).

[7] The Government at oral argument admitted that at least until the 1952 Act, the number of commuters who arguably could be called seasonal was "inconspicuous."

"seasonal worker is a person who came into being largely after the repeal of the bracero law," and that "many of them are former braceros who have been admitted to the United States temporarily for employment under" the Act.[8] Thus, while the daily commuter can work only within a relatively short automobile drive of the border, the seasonal commuter works in areas far inland in competition with a depressed and economically deprived work force of this country.

The metamorphosis of the bracero to seasonal commuter is directly inconsistent with Congress's purpose in ending the bracero program in order to eliminate its adverse impact on American workers. While the bracero program had many protections designed to protect domestic labor, the ex-bracero as a seasonal commuter enters and leaves the United States freely, subject to none of the many safeguards for domestic labor which characterized the bracero program prior to its termination in 1964. The fact that Congress has approved the continued existence of the daily commuter program is no indication that it has approved a program which circumvents explicit expressions of Congressional concern for American labor, is a short-lived invention of the Service and which flies in the face of traditional Congressional concern for the American working man.[9]

More specifically, the Service, in order to reach this result, has interpreted seasonal commuters as "returning resident aliens," a class of immigrant not required upon re-entry to obtain immigrant visas. 8 U.S.C. § 1181(b)

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[8] Statement by James S. Hennessy, Executive Assistant to the Commissioner of the Service, at the *Hearings on H.R. 12667, Employment of "Green Card" Aliens During Labor Disputes Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 73 (1969).

[9] The Court does not read the Secretary of State's affidavit as directed to the seasonal commuter system. See *infra* footnote 26.

(1970). A returning resident alien is defined in the same Act as an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad." 8 U.S.C. § 1101(a)(27)(B) (1970). The regulations amplify this definition by describing returning resident aliens as persons "returning to an unrelinquished lawful permanent residence in the United States after a temporary visit abroad." 8 C.F.R. 211.1 (b)(1) (1972). As Judge Wright so persuasively pointed out in his dissenting opinion in the *Gooch* case,[10] the construction of "lawfully admitted for permanent residence" as including commuters "makes nonsense of the Congressional policy embodied in no fewer than five sections of the Act entirely apart from § 1101(a)(27)(B) and is contrary to the plain meaning of two others." In short, seasonal commuters are improperly classified as "returning resident aliens" and are not entitled to the benefits of such classification. The Service's practice is in violation of the clear and plain language of the statute.

Aside from Congressional purpose and intent, we also find that seasonal commuters are properly to be classified as non-immigrants under the Act. Section 101(a)(15) of the Immigration and Nationality Act defines an immigrant as an alien not coming within ten categories of non-immigrants. 8 U.S.C. § 1101(a)(15) (1970). A non-immigrant is there defined as—

> "[A]n alien having a residence in a foreign country which he has no intention of abandoning * * * (ii) who is coming *temporarily* to the United States to perform *temporary* services or labor. * * *" [Emphasis added.] 8 U.S.C. § 1101(a)(15)(H) (1970).

This provision reflects the intention of Congress in the Act of 1952 to differentiate carefully between immigrants

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[10] *Gooch* v. *Clark*, 433 F.2d 74, 83 (9 Cir. 1970).

coming to the United States for permanent residence and non-immigrants coming temporarily.[11] Congress, therefore, in Section 101(a)(15)(H) created a new class of non-immigrants coming temporarily to perform services or labor. The purpose of the provision was to allow the admission of certain workers to alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production." [12]

Subsection (H) explicitly covers a person coming to this country to perform services or labor if both the visit and the service are temporary. Seasonal commuters reside in a foreign country which they have no intention of abandoning, and they come only temporarily to the United States. All commuters who work as agricultural laborers only during the agricultural season provide only temporary services or labor. Seasonal commuters involved in this case come clearly within that section.[13] The Service's practice of classifying seasonal commuters as "returning resident aliens" thus has no statutory warrant, is contrary to the intent of Congress, and is illegal.[14]

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[11] *See* H. REP. No. 1365, 82d Cong., 2d Sess., 36-37 (1952).

[12] *Id.* at 45.

[13] Subsection (H) does not apply to daily commuters who come to the United States to a steady job throughout the year. While such a commuter comes temporarily to the United States each day, the services he provides are not temporary.

[14] In view of our holding that seasonal commuters coming to the United States for the first time today must be considered as non-immigrants under Section 101(a)(15)(H), it is also plain that seasonal commuters who have previously come to the United States as immigrants admitted for permanent residence must now be considered as non-immigrants. The Service's error in considering them as immigrants cannot convert non-immigrant into immigrant status. The law is plain that each and every time an alien enters the United States, his entry must be legal as of that time. It is

no longer sufficient that the alien legally entered the United States on prior occasions. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Bonetti* v. *Rogers*, 356 U.S. 691, 698 (1958). Consequently, when a seasonal commuter enters the United States today, the legality of his entry must be determined as of that time. Even if the seasonal commuter entered legally one or a score of times before as an immigrant, his entry must be re-evaluated. Since he is a non-immigrant, he must conform with the laws relating to non-immigrants.

For the purpose of identifying the class which will be affected by our ruling re seasonal commuters, the Court notes that the Service considers seasonal workers who are present in the United States for over six months each year to be permanent alien residents of the United States despite the fact that their actual dwelling place in fact may be in a foreign contiguous country. *Matter of Hoffman-Arvayo*, —— I. & N. —— No. 2095 (Sept. 7, 1971); I GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 2.19 (1972 Supp.). The Government appears to have conceded that all commuters—with the exception of those commuters who live and work in the United States for more than six months each year—do not reside in the United States. This concession covers the large majority of seasonal commuters since most seasonal commuters stay in this country only for the harvest season, a period of four to six months depending on the crop. However, some commuters do stay over six months in the United States. It must be observed that these commuters also may be affected by the Court's ruling since the position of the Service in equating mere physical presence over the six months with residence in this country is without statutory or logical basis.

The definition of residence received its present form in the 1952 Act. 8 U.S.C. 1101(a)(33) (1970). Prior to the 1952 Act, the Nationality Act of 1940 provided that "the place of general abode shall be deemed the place of residence." § 104, 54 Stat. 1138. The 1952 Act tightened this definition by defining "the place of general abode" as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33) (1970). Actual residence is not then synonymous with physical presence but is a question of fact to be determined in each case. *See In Re Olan*, 257 F.Supp. 884, 893 (S.D. Cal. 1966); *Petition for Naturalization of Castrinakis*, 179 F.Supp. 444, 446 (D. Md. 1959); *Toy Teung Kwong* v. *Acheson*, 97 F.Supp. 745 747 (N.D. Cal. 1951). If it is determined that workers coming seasonally to the United States for periods of over six months do in fact reside in a foreign contiguous country, they are seasonal commuters who fall within the framework of this decision.

II

On the other hand, the daily commuter system dates from 1927, more than 45 years ago. Its historical origin stems from a border crossing system of the nineteenth and early twentieth centuries as a result of which aliens living in Canada and Mexico, as well as United States citizens living in the United States, were able to travel freely into the adjoining country for pleasure, for business or for employment. This border crossing system in its legal aspect can best be described as an informal reciprocal arrangement between the Government of the United States and the Governments of Canada and Mexico. In 1917, pursuant to a directive in the Immigration Act of that year to expedite travel to the United States from Canada and Mexico, the Service prescribed an identification card for use of those who resided on either side of the border and habitually crossed the boundary for legitimate purposes. Between 1917 and 1927, aliens to whom identification cards had been issued enjoyed border crossing privileges as long as they were not barred by any qualitative exclusion provision of the 1917 Act.[15] These rules for border crossers continued unchanged until April, 1927.

The 1924 Act did not repeal or modify the basic 1917 Act but was expressly declared to be an addition to and not a substitution for the 1917 law.[16] The 1924 Act classified all arriving aliens as either immigrants or non-immigrants. An immigrant was defined as any alien destined to the United States except one within any of the six enumerated non-immigrant classes.[17] As a result, by 1927 the Service in General Order No. 86, had decided that aliens residing in foreign contiguous countries and entering the United States to engage in employment would thereafter be considered "immigrants"

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[15] *See* Act of February 5, 1917, §§ 3, 23; 39 Stat. 875, 892.

[16] Immigration Act of 1924, § 25; 43 Stat. 166.

[17] *Id.* § 3, 43 Stat. 154-55.

who must first be admitted for permanent residence.[18] Those who achieved such admission within a grace period were permitted to enjoy the border crossing privilege. Paragraph Five of the General Order provided that "[a]liens who have complied with the requirements of this General Order governing permanent admission will be considered as having entered for permanent residence." Thus, the daily commuter was born.

General Order No. 86 rested on the implied premise that the adaptation of the border crosser system to the Immigration Act of 1924 and its continued existence as the daily commuter system was in accord with the will of Congress. The 1924 Act had made no mention of border crossers as such. In the contemporaneous view of the administrative authorities it was plain, however, both from the statute itself and from its history, that Congress did not attempt to deal with the already long-standing border crossing system, and must not have intended to disturb it. In the 1924 Act, Congress was wholly preoccupied with restricting overseas immigration, particularly from certain countries in eastern and southern Europe. Meanwhile, the directive of the 1917 Act to facilitate border crossing remained on the statute books. Since then the Service has maintained control over the daily commuter system through administrative practice.

In 1952 the organic statute, the Immigration and Nationality Act, became law. This Act brought together the elements of both the 1917 and 1924 Acts and at the same time enacted certain new provisions. Daily commuters were not mentioned in the new law and its text and legislative history are silent on the subject. From this, the Service might well have concluded that it was the intent of Congress in the Act to permit alien commuters to continue to come to the United States in the

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[18] General Order No. 86, Bureau of Immigration, April 1, 1927.

same status they had enjoyed under the prior laws. Certainly, if Congress had intended with one stroke to outlaw the commuter system, thereby taking away the long-standing right of entry of aliens who had been admitted for permanent residence, there would have been some indication of such intent.[19]

In the light of the above history and administrative practice, it is fair to assume that the historic daily commuter practice known to Congress [20] was expected to continue unchanged in the 1952 law. Where an administrative practice has continued in existence for over 45 years and has consistently been extended in the light of various immigration Acts which have never expressed any mention or disavowal of the practice,[21] efforts to change or eliminate such a practice should be addressed to the Congress, not to the Courts.[22]

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[19] No mention of commuters is made in the 1965 amendments of the 1952 Act. Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, *amending* 8 U.S.C. 1101 *et seq.* (1970).

[20] *See* S. REP. No. 1515, 81st Cong., 2d Sess., 535-36, 616 (1950).

[21] *See Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States*, 377 U.S. 235 (1964). There concerning the reenactment rule, Mr. Justice Harlan, for a unanimous Court noted:

"Some weight is due to the consistent interpretation of the Maritime Commission, the agency entrusted with administration of the statute. . . . The successive extensions by Congress of the Commission's authority . . . are certainly not controlling, particularly since it does not appear that Congress ever advertently addressed itself to the claim of invalidity . . .; they do, however, strengthen to some extent the Commission's conclusions . . . . Needless to say, these 'interpretative aids,' neither singly nor in conjunction, could lead to an affirmance here if it were clear that the Commission's action contradicted the requirements of the . . . Act . . . However, they are consistent with, and lend support to, what we believe to be the most sensible view of the statutory framework."

Id. at 241-42. *See also* 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.07 (1958).

[22] Legislation was introduced into the 92nd Congress which would profoundly affect the commuter system. *See, e.g.*, S. 1373, 92d Cong., 1st Sess. (1971); S. 1488, 92d Cong., 1st Sess. (1971); H.R. 8746, 92d Cong., 1st Sess. (1971); H.R. 14831, 92d Cong., 2d Sess. (1972).

The Court is also mindful that the plaintiffs place reliance on the plain language of 8 U.S.C. §§ 1181(b), 1101(a)(27)(B), and 1101(a)(20) (1970). The majority opinion in *Gooch* v. *Clark*, 433 F.2d 74, 78-81 (9 Cir. 1970), answers some of these contentions.[23] It should suffice to say that the statutory language is not as plain and unambiguous as plaintiffs contend.[24] Plaintiffs, for instance, make much of the contention that one living in a foreign contiguous country cannot be a "resident" of the United States. But the concept of permanent "residence" can be taken to include the place of work of a daily commuter crossing international boundaries, in the same sense that a person commuting daily to his business in New York City, where he has a permanent commitment and interest in the on-going vitality and soundness of the city, and where he may have, for example, fraternal and cultural associations, may well consider himself a New Yorker even though his home in the suburbs is located in New Jersey or Connecticut. Daily commuters are often fully integrated into the United States economy including—particularly in the case of commuters from Canada—membership in United States unions, and supervisory positions in United States business enterprises. Thus, a daily commuter could be a resident of the United States within the plain language of the Act.

Finally, we are aware that the perpetuation of the daily commuter system is vital to the lives of thousands of daily commuters on both sides of our land borders. These individuals make important contributions to the economies of their respective cities, such as Windsor-Detroit, and reversal of the present practice would cause severe dislocation and hardship. In seeking an answer to

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[23] The Court in *Gooch* did not sharply distinguish daily from seasonal commuters.

[24] *E.g.*, 433 F.2d at 78-79.

the economic competition of ex-braceros who operate under the seasonable commuter system, plaintiffs seek the wholesale expulsion or exclusion from the United States of daily commuters who entered this country in reliance upon the immigration law as interpreted by the Service,[25] and despite the fact that they may have worked in this country for many years.[26]

Plaintiffs' request for relief is broader than is necessary to meet the burden of their complaint; they have used a broadsword when a rapier would have been more appropriate. We are unwilling to disregard this long-standing administrative practice by ordering a change of such far-reaching consequences and affirm the action of the District Court as it relates to daily commuters.

Our disposition differs from that proposed in *Gooch* by either the majority or dissent. While we have rooted our disposition in the statute as it stands, we have been particularly mindful of the need for construction in the light of a genuinely long-standing administrative practice in regard to daily commuters, a practice that we are convinced Congress did not mean to scrap, so far as concrete results of admittance of daily commuters are concerned. As to the post-1964 practice of the Service in

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[25] *See Texas State AFL-CIO* v. *Kennedy*, 330 F.2d 217, 219 (D.C. Cir.) *cert. den.* 379 U.S. 826 (1964).

[26] Also involved are the Governments of Canada and Mexico. The Secretary of State, in an affidavit before the Court, has voiced the concern of these two neighboring countries at the possibility of a sudden judicial termination of the commuter system. In his considered judgment, such a change of policy would have "a serious deleterious effect" and "adversely affect" our relations with our two neighbors. Appendix at 52-54, Affidavit of Honorable William P. Rogers, Secretary of State of the United States, filed October 13, 1970. Although the Secretary for obvious reasons made no mention of the likelihood of an adverse response by Canada and Mexico against American nationals commuting daily to work in those two countries, the strong possibility of retaliatory measures by these countries requires no elaboration by us.

regard to seasonal commuters, it is not only recent in origin, but is so patently a jerry-built patchwork, a synthetic construct hastily assembled after the termination of the bracero program in obvious contradiction to the legislative intent, that it cannot be given serious consideration as a meaningful guideline for the interpretation of the statute.

Accordingly, this case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX C

[Filed April 16, 1973, Hugh E. Kline, clerk]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

Civil Action 3386-69

No. 72-1178

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

ROBERT BUSTOS, ET AL., UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1200

ROBERT BUSTOS, ET AL., CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Appeals from the United States District Court for the District of Columbia

Before GEORGE C. EDWARDS, JR.,* *Circuit Judge for the Sixth Circuit*, LEVENTHAL, *Circuit Judge*, and JOHN H. PRATT,** *United States District Judge for the U.S. District Court for the District of Columbia.*

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

Hugh E. Kline,
Clerk.

Dated: April 16, 1973

Opinion by District Judge Pratt.**

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

[Filed May 22, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-1178

Civil Action 3386-69

ROBERT BUSTOS, AND LUPE MURQUIA, APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 72-1179

Civil Action 3386-69

ROBERT BUSTOS, ET AL.
UNITED FARM WORKERS ORGANIZING COMMITTEE, APPELLANT

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1972

No. 72-1200
Civil Action 3386-69

ROBERT BUSTOS, ET AL.
CRISTOBAL CARDONA, ET AL., APPELLANTS

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

Before: Edwards,* Circuit Judge for the Sixth Circuit; Leventhal, Circuit Judge and Pratt,** U.S. District Judge of the U.S. District Court for the District of Columbia.

ORDER

Appellants have filed a petition for clarification and rehearing with respect to this court's judgment of April 16, 1973. The Court is of the view that the application of the principles set forth in its opinion will remove, or at least modify, differences that may now exist between the parties on other matters initially in issue. It is for the district court, in the first instance, to consider whether further relief is appropriate, in the implementation of our decision. If a controversy continues, it will be examined and decided in the light of our opinion, first by the district court, and if necessary by this court on appeal. Accordingly, it is

ORDERED by the Court that appellants' aforesaid petition for classification and rehearing is denied.

Per Curiam

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* Sitting by designation pursuant to Title 28 U.S. Code Section 291(a).

** Sitting by designation pursuant to Title 28 U.S. Code Section 292(a).

No. 73-480

In the Supreme Court of the United States

OCTOBER TERM, 1973

CRISTOBAL CARDONA, ET AL., PETITIONERS

v.

ROBERT H. BORK,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-480

CRISTOBAL CARDONA, ET AL., PETITIONERS

v.

ROBERT H. BORK,
ACTING ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

On May 13, 1970, petitioners, representing themselves and other farm workers in Texas, intervened as plaintiffs in a class action brought by California farm workers in the United States District Court for the District of Columbia. The complaint sought declaratory and injunctive relief against the continued admission into the United States by the Immigration and Naturalization Service of alien "commuters"—*i.e.*, aliens previously authorized for permanent residence in the United States who maintain homes in Mexico or Canada from which they commute daily or seasonally into this country to work. The complaint alleged that the practice of admitting aliens who once had valid immigrant visas but who now enter the country by use of their Alien Registration Receipt Cards violates applicable provisions of the Immigration and Nationality Act of 1952, 8 U.S.C.

1101, *et seq.* On December 21, 1971, the district court granted the government's motion for summary judgment (Pet. App. A).

On appeal, petitioners contended that alien commuters must have immigrant visas and a labor certification from the Secretary of Labor in order to enter the United States, that most commuters are properly non-immigrants who may not be admitted unless the Secretary of Labor determines that there is a labor shortage, and that commuters may not enter the country to take employment where a labor dispute exists, even if they have been previously employed there during a prior agricultural season. The court of appeals upheld the validity of the daily commuter procedure but ruled that the practice of admitting seasonal commuters as returning resident aliens was unlawful. The case was remanded to the district court for proceedings consistent with the court of appeals' opinion (Pet. App. B).

On August 14, 1973, the government filed a petition for a writ of certiorari (No. 73-300) to review that portion of the court of appeals' ruling which invalidated the practice of admitting seasonal commuters as returning resident aliens. Petitioners, who filed a brief in opposition to the government's petition, here seek review of the remaining portion of the court of appeals' ruling (upholding the practice of admitting alien daily commuters), but only in the event that the government's petition in No. 73-300 is granted (Pet. 9, 17).

The Court of Appeals for the Ninth Circuit, in *Gooch* v. *Clark*, 433 F. 2d 74, certiorari denied, 402 U.S. 995, has upheld both the daily and the seasonal commuter programs. The decision of the court below in the present case thus conflicts with that of the Ninth Circuit only on the issue presented in our petition:

whether the seasonal commuters may properly be treated as duly admitted immigrants returning from temporary visits abroad. The two courts are in agreement that daily commuters may be so treated.

We think both courts decided the daily commuter issue correctly. We agree with petitioners, however, that the legal issues respecting both classes of commuters are identical in many respects. Indeed, prior to the decision below in this case, it had been assumed by all that the daily and seasonal programs were legally indistinguishable (see Pet. App. 23).

We therefore suggest that it would be appropriate for the Court to grant the petition in this case if it grants the government's petition in No. 73-300. In that way, it could resolve the legal status of both classes of commuters in a single proceeding.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.